

No. 77-1856

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In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD WOODFORD, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was deprived of the effective assistance of counsel during trial because no pretrial motion was made to suppress his criminal record, because a defense witness was called despite the fact that the prosecution had a tape recording that contradicted part of the witness' testimony, and because no objection was made to the introduction of the tape into evidence.

After a jury trial in United States District Court for the Southern District of New York, petitioner was convicted on two counts of possessing heroin with intent to distribute, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A). He was given concurrent sentences of eight years' imprisonment on each count, to be followed by a six-year special parole term. The court of appeals affirmed in open court (Pet. App.).

1. The government's evidence showed that on January 18 and 26, 1977, petitioner sold heroin to Lucille Williams, who was acting as middleman for an informer. Williams pleaded guilty (Tr. 23) and testified for the government that she had agreed to acquire the heroin for the informer and that she contacted petitioner to arrange the purchases. She received the heroin from petitioner after paying him with funds received from the informer (Tr. 27-42). Several DEA agents testified that they had Williams under surveillance when she met petitioner and consummated the sales. Petitioner took the stand and denied that he had sold narcotics to anyone (Tr. 218-219).

2. There is no merit to petitioner's claim of ineffective assistance of counsel. At bottom, his complaint is no more than second-guessing reasonable defense tactics that did not result in an acquittal.

a. As petitioner's counsel pointed out in summation (Tr. 344), the outcome of the trial turned largely on whether the jury believed petitioner or Williams. Counsel's strategy, therefore, was to present petitioner as a reformed offender more worthy of belief than Williams, whom counsel attempted to portray as an admitted narcotics user who was vindictive toward petitioner because he had jilted her (see Tr. 203-204, 208, 210). Consistent with this strategy, petitioner opened his direct testimony by making, in response to his attorney's request, a "complete breast" of his criminal past, including the fact that he had been convicted in 1958 and again in 1963 of narcotics possession (Tr. 196). He went on to testify that, after his release from the penitentiary in 1969, he became a legitimate businessman (Tr. 197-203, 205-206, 212, 215-216) who hired ex-offenders to give them a chance (Tr. 223-224) and who contributed to a narcotics rehabilitation program (Tr. 206). This affirmative use of petitioner's past record was a

reasonable defense strategy; that it was not successful does not demonstrate that petitioner's counsel was incompetent.¹

b. The second branch of petitioner's strategy (see Tr. 346) was to suggest that Williams had in fact obtained the heroin from Herman Howell, Williams' common law husband and a longtime friend of the informer (Tr. 28-29). Howell was called as a defense witness and testified that he had obtained a quantity of heroin approximately three weeks before the transaction in this case (Tr. 268). Although counsel expected Howell to say that he gave the heroin to Williams (Tr. 266), Howell testified only that he used some of it and sold some of it (Tr. 269). He did, however, state that he had never received any narcotics from petitioner and had never seen petitioner sell any narcotics (Tr. 270). On cross-examination, he admitted having a conversation with the case agent (who was acting at the time in an undercover capacity), but denied telling the agent that petitioner kept heroin on his business premises, supplied other employees with heroin, or had previously sold narcotics (Tr. 273-275). In rebuttal, the government introduced a tape recording which the agent had made of the conversation; the recording refuted Howell's denial (Tr. 308-315).

There is no substance to petitioner's claim that his counsel acted incompetently in failing to object to admission of the recording. The recording was relevant evidence impeaching Howell's testimony that he had never

¹The 1963 conviction would have been admissible in any event to impeach petitioner's credibility because he was not released from the ensuing prison sentence until August 1969, approximately eight years before his trial in this case. See Fed. R. Evid. 609(b); *United States v. Ortiz*, 553 F. 2d 782, 784 (C.A. 2).

seen petitioner sell any narcotics and hence admissible. Nor was the decision to call Howell in the face of the government's possession of the impeaching tape unreasonable. Counsel hoped that Howell would exculpate petitioner by claiming to be the source of Williams' heroin. The decision to use Howell to explain Williams' possession of the heroin that she testified she had obtained from petitioner was a calculated but reasonable risk to advance petitioner's attempt to explain the facts away. The fact that Howell's testimony did not support petitioner's theory cannot fairly be said to have deprived petitioner of the effective assistance of counsel.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.